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Supreme Court of the United States

October Term, 1977

No. 77-454

MOORMAN MANUFACTURING COMPANY,
Appellant
v.
G. D. BAIR, Director of Revenue, State of Iowa,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

AMICUS CURIAE BRIEF OF THE MULTISTATE TAX COMMISSION AND ATTORNEY GENERAL of the STATE OF OREGON

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I

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into cur-

rently by 19 states as full members, and by 13 states as associate members.[1]

The purposes of the Compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.

In fulfillment of these objectives in the area of State income taxation of multistate businesses, Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Laws in 1957 for the allocation and apportionment of income.[2] It apportions "business income" in accordance with the well recognized three factor apportionment formula of property, payroll, and sales, commented on by this

[1] The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington.

The current associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, and West Virginia.

[2] Uniform Laws Annotated, Vol. 9a, p. 448 et seq.

Court in *General Motors Corporation vs. District of Columbia,* 380 U.S. 553 (1965).

Article VII permits the Commission to promulgate advisory rules and regulations concerning this Uniform Act. The Compact also provides Joint audits at the request of member states to further implement uniform enforcement of the Uniform Act. In this manner, the Compact and the Commission have sought to substantially diminish potential problems of overtaxation or undertaxation of the income of enterprises carrying on business activities in two or more states or countries. The Commission is thus concerned with the purpose for, the operative effect of, and the constitutional validity of any state income tax apportionment formula that substantially deviates from the generally accepted and well recognized UDITPA formula contained in Article IV of the Compact and generally utilized by most of the income tax states for the division of income. The Attorney General of the State of Oregon has a comparable concern inasmuch as Oregon is a member of the Compact and has adopted UDITPA for Oregon income tax purposes.

II

ARGUMENT

A. Introductory Considerations.

This is undoubtedly one of the most important cases this Court has been asked to decide pertaining to the constitutional limitations on a state's power to tax the income of multistate-multinational corporations. The primary purpose of this brief is to place the

issue in this cause in what we believe to be its proper constitutional setting and to suggest a resolution of that issue. While the Appellant and Appellee will undoubtedly argue that resolution of this case is controlled by precedent, we believe that if this Court is to decide that the single-sales-factor apportionment formula is unconstitutional, it is necessary that the interstate commerce and due process clauses limitations on state taxing power be applied in a different manner than has heretofore been the case.

The issue in this cause is whether or not the Iowa single-sales-factor apportionment formula is unconstitutional on its face or as applied to Appellant because it attributes the income of an integrated manufacturing-sales corporation, which is subject to apportionment under Iowa law, to the distribution of sales rather than to the distribution of tangible property, payroll, and sales. Inasmuch as the record contains no evidence that the Iowa formula arrives at an unreasonable result or taxes extra-territorial income of the Appellant except for the fact that the formula attributes no income to the manufacturing activities of Appellant in Illinois and except for the fact that Illinois apportions income for income tax purposes by the well-recognized three-factor apportionment formula (property, payroll, and sales), the constitutionality of the single-sales-factor apportionment formula as applied really turns on whether or not it is unconstitutional on its face. This is a question of first impression.

Resolution of the constitutionality of the Iowa formula as applied in this case is compounded by the fact that Iowa did not subject to tax all of the net income of the Appellant and by the further fact that not all of the net income of the Appellant which was subject to tax was apportioned. Some of Appellant's net income was specifically allocated without a determination of whether or not it was part of Appellant's unitary income and therefore part of apportionable income for constitutional limitation purposes. Furthermore, the Appellant carried on some of its business activities through subsidiary corporations and there is nothing in the record to indicate that Appellant was not carrying on an integrated unitary business with such corporations. If it did carry on a unitary business with its subsidiary corporations, the constitutionality of the Iowa formula should be determined in reference to the total unitary income of Appellant and its subsidiary corporations and not just the income of Appellant.

Inasmuch as the states are entitled to a reasonable apportionment of all unitary income of a unitary business (whether carried on in a single or multiple corporate form), in addressing the question of the constitutionality of Iowa's single-sales-factor apportionment formula, this Court should clearly indicate in any decision in this cause that it has reference to the total unitary income of a unitary business and *not*

the particular income of Appellant subject to apportionment by Iowa.[3]

If multistate-multinational businesses are required to pay their fair share of state taxation free from discriminatory or multiple tax burdens, we believe this case poses the following issue for resolution:

> Whether or not the due process and commerce clause restrictions for state income tax purposes preclude a state from apportioning unitary income of a unitary enterprise conducting integrated manufacturing-sales operations by an apportionment formula which deviates from the generally accepted and well-recognized equally weighted "three-factor formula" of payroll, property, and sales (UDITPA) in the absence of any showing by the state or the taxpayer that this formula arrives at an unreasonable result.

While we realize that resolution of this issue requires this Court to take a different approach in resolving state income tax apportionment disputes, we believe it is the basic issue in this cause since the apportionment result of the Iowa single-factor formula is challenged by the Appellant because it deviates from the three-factor formula and thereby allegedly results in subjecting the Appellant to multiple and discriminatory taxation by Iowa.

We believe that if this Court does not adopt a

[3] For example, if Iowa subjected only one-third of the entire unitary net income to tax and apportioned that on the basis of a single-sales-factor apportionment formula, the result would be no different in practical operation and effect than if it applied the property, payroll and sales factors apportionment formula to the entire unitary income. Appellant is thus in error in arguing (Jur. St., p. 3) that what constitutes a state's apportionable income tax base is irrelevant in deciding the constitutionality of an apportionment formula.

standard against which to test the validity of the Iowa apportionment formula, it has no basis for invalidating that formula. Furthermore, simply invalidating the single-sales Iowa apportionment formula still leaves multistate-multinational businesses exposed to multiple and discriminatory taxation by the states by other comparable formulae. Inasmuch as the property, payroll, and sales fairly and adequately measures the major income producing components of general commercial enterprises, there is no reason why these components, equally weighed, should not constitute an appropriate and presumably valid apportionment standard to measure the constitutionality of state income tax apportionment formulae as applied to the unitary income of integrated manufacturing-sales businesses within the purview of the commerce and the due process restrictions of the federal constitution.

The purpose of this brief is to indicate why we believe this to be so and why we believe it is required if the constitutional limitations on state taxing power as developed by this Court are to be placed in practical operation and effect.

B. The Results of Prior Apportionment Cases of This Court, Which Have Prescribed No Apportionment Standard to Resolve the Reasonableness of or Discriminatory Effect of any State Income Tax Apportionment Formula, Support the Decision of the Iowa Supreme Court.

The Supreme Court of Iowa upheld the single-

sales-factor apportionment formula on its face and as applied to Appellant because it

> " . . . is fairly calculated to assign to Iowa only that portion of the taxpayer's net income reasonably attributable to the trade or business done in Iowa since the taxing power asserted by this statute bears fiscal relation to the protection, opportunities and benefits given by the State." (Jur. St. A78-A79).

and because

> "Under the record, Moorman has not carried its burden, since it has not demonstrated by the stipulated facts the Iowa single-sales-factor apportionment formula constitutes an unreasonable and arbitrary application in Moorman's particular case. (A87 Jur. St.)

In determining whether or not the Iowa Supreme Court arrived at a proper conclusion in light of prior decisions of this Court, we note the following due process and commerce clause principles:

1. The States may determine their share of the unitary income of a unitary business by an apportionment formula. *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliffe & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271 (1924); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965).

2. Single factor apportionment formulae are not *per se* unconstitutional. *Underwood Typewriter Co. v. Chamberlain, supra; Bass, Ratcliffe & Gretton, Ltd. v. State Tax Commission, supra; National Leather Co. v. Massachusetts*, 277 U.S. 413 (1928); *Maxwell v. Kent-Coffey Mfg. Co.* 264 N.C. 365, 168 S.E. 397 (1933) aff'd 291 U.S. 642 (1933); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); and *General Motors Corp. v. District of Columbia, supra.*

3. It is impossible for a state to achieve a perfect apportionment of expansive complex business activities and rough approximation rather than precision is sufficient. *International Harvester v. Evatt*, 329 U.S. 416 (1947).

4. A taxpayer challenging the result reached by the application of an apportionment formula has a heavy burden and must establish by "clear and cogent evidence" that the apportionment formula results in the taxation of extraterritorial values. *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942); *Norfolk & Western R. Co. v. North Carolina*, 297 U.S. 682, 688 (1936); and *Norfolk & W. R. Co. v. Tax Commission*, 390 U.S. 317, 326 (1968).

5 A tax on "interstate commerce" must be fairly apportioned to the commerce carried on within the state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *Northwestern Cement Co. v. Minnesota, supra*, 358 U.S. 460 (1959).

In applying the foregoing principles, to our knowledge this Court has never declared a state apportionment formula invalid under the Constitution by reference to a more rational or reasonable apportionment formula. Furthermore, to our knowledge, it has never de-

clared an apportionment formula invalid on its face, or decided an apportionment case by reference to its discriminatory or multiple burden effect on interstate commerce.[4]

Underwood Typewriter Co. v. Chamberlain, supra, upheld a single-factor-property formula apportioning net income to Connecticut against due process and commerce clause attack. This is so even though this Court there noted that the profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sales in other states. Likewise *Maxwell v. Kent-Coffey Mfg. Co., supra,* 204 N.C. 365, 168 S.E. 397 (1973) aff'd *per curiam* 291 U.S. 624 (1933) upheld a single-factor-property formula which attributed 99 % of the net income of a corporation to North Carolina even though the corporation sold less than 1% of its products in North Carolina. In *Ford Motor Co. v. Beauchamp, supra,* 308 U.S. 331 (1939), this Court upheld a single-factor gross receipts apportionment formula in apportioning capital to Texas for Texas corporate franchise tax purposes. The validity of such apportionment formulae is no more or less constitutionally suspect than the Iowa single-sales-factor apportionment formula.

In order to invalidate an apportionment formula, taxpayers have been required to resort to "separate

[4] As indicated by argument under the subdivision of this brief beginning on page 18, we believe the Iowa single-sales-factor apportionment formula is invalid on its face because it discriminates against out-of-state manufacturers and interstate commerce if some income is constitutionally required to be attributed to manufacturing.

accounting". In *Hans Rees Sons, Inc. v. North Carolina,* 283 U.S. 123 (1931), the taxpayer was able to establish by the proffer of evidence that its "manufacturing profit" represented only 17% of its profit while the North Carolina property factor apportioned 66% to 85% of the profit to North Carolina. Based upon this proffered evidence, this Court found the North Carolina property factor unconstitutional as applied. Similarly, In *Norfolk & Western Railway Co. v. Missouri State Tax Commission,* 390 U.S. 317 (1968), this Court invalidated the application of an ad valorem property tax apportionment formula which attributed $20,000,000 of rolling stock to the state where the taxpayer demonstrated that only $7,600,000 of its rolling stock was in the state.

Consistent with the results reached by this Court in its prior decisions, there is no basis for concluding that the single-sales-factor apportionment formula of Iowa facially or as applied to Appellant is unconstitutional because it does not result in a rough approximation of the net income reasonably attributable to Iowa sources. These decisions recognize that it is impossible to determine what portion of the net income of a unitary integrated enterprise can be attributable to specific properties, activities or sources of such an enterprise; that rough approximation is all that is required of an apportionment formula; and that the taxpayer has the burden of establishing by "clear and cogent" evidence that an apportionment formula has the practical effect of taxing extraterritorial values.

Tested against these standards, we believe there is nothing in the record in this cause that indicates that the Iowa single-sales-factor apportionment formula has taxed net income of Appellant not reasonably attributable to Iowa sources. States otherwise, for example, there is nothing in the record to establish that the warehousing and selling in Iowa of approximately 22% ($22,102,015) of the total products sold by Appellant for the fiscal year ending March 31, 1968, did not increase Appellant's net income for that period by the amount of $1,548,284 out of a total taxable income prior to Iowa adjustments of $10,393,161 without consideration of the effect of and whether or not Appellant conducted a unitary business with its subsidiary corporations.[5] If the Appellant could not have used Iowa as a market for 22% of its products, it may well have realized no net income for the year ending March 31, 1968. This is exemplified by the current plight of the United States Steel industry due to foreign competition for American steel markets. Furthermore, it is no more unreasonable to attribute all of the profits of Appellant to sales than it is to attribute it to tangible property.

Thus, if the due process and commerce restrictions on state taxing power as applied to interstate commerce *only* require that a state's apportionment formula arrive at a rough approximation of income attributable to instate sources; that it be reasonably related to the benefits conferred by the taxing state; and that the burden is on the taxpayer to establish the contrary by "clear and cogent" evidence; we believe the Iowa Supreme Court arrived at a proper result in this case based on the single factor apportionment cases such as *Underwood Typewriter Co. vs. Chamberlain supra,* and *Ford Motor Co. v. Beauchamp, supra.* The Appellant has not established by "clear and cogent" evidence that the apportionment result attributed more of its net taxable income to Iowa than reasonably attributable to Iowa sources particularly in the *absence of a controlling constitutional standard for determining a fair or rational apportionment.* Appellant *assumed* that the three-factor formula was the constitutional standard and from that premise argues the unconstitutionality of the apportionment result.

[5] If Appellant actually carried on a unitary business with its subsidiaries, net income of that business and the apportionment result of applying the Iowa single-sales-factor apportionment formula to the net income of such a unitary business is not known.

C. *In Order to Require Multistate-Multinational Businesses to Pay Their Fair Share of State Income Taxes and to Protect Such Businesses From Discriminatory or Multiple State Income Taxes, It Is Necessary That This Court Prescribe a Rational and Fair Apportionment Standard for the Apportionment of State Income Taxes.*

This Court has consistently interpreted the commerce clause as freeing interstate commerce from undue or multiple tax burdens and from discriminatory taxation as compared to intrastate commerce. *Northwestern Cement Co. v. Minnesota, supra; Complete Auto Transit v. Brady, supra; General Motors Corp.*

v. Washington, 377 U.S. 436 (1964). In order to relieve interstate commerce from such burdens or discrimination, it has required the use of apportionment formulae designed to tax only that portion of an interstate business carried on within a taxing state, *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), and required apportionment formulae to bear a rational relationship to activities and properties within a taxing state, *Norfolk v. Western Railway Co. v. Missouri*, 390 U. S. 317 (1968) and to be fairly apportioned (*Complete Auto Transit, Inc. v. Brady, supra; General Motors v. District of Columbia, supra.*)

However, by not defining what constitutes a rational or fair apportionment, this Court has left the states free to choose their own apportionment formulae subject to the rough approximation and "clear and cogent" evidence standards. As a practical matter, then, the states, by the application of different apportionment formulae, may, within the framework of the decided apportionment cases, subject interstate commerce to multiple burdens and may in fact design apportionment formulae which in practical operation and effect, when considered together with other apportionment formulae, discriminate against "interstate" commerce as compared to "intrastate" commerce. This the commerce clause was never designed to permit [6].

[6] The following statements from *Northwestern Cement Co. v. Minnesota, supra*, appear to state the position this Court has taken with regard to the multiple burden-discrimination issue under the commerce clause:

"While the economic wisdom of state net income taxes is one of

The need for a rational standard to resolve multiple burden and discrimination problems is not alleviated by simply holding that the Iowa single-sales-factor formula is unconstitutional because it does not constitute a fair or rational apportionment formula. Iowa could comply with such a holding by giving limited weight to the out-of-state activiites of the Appellant. This could still leave the Iowa formula at substantial variance with the equally weighted three-factor apportionment formula of property, payroll and sales. This Court in striking down the single-sales-factor ap-

state policy not for our decision, one of the 'realities' raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in *Central Greyhound Lines v. Mealy*, 334 U.S. 653, 661 (1948), ' . . . it is interstate commerce which the State is seeking to reach and . . . the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.' The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce.' *Id.* at 670. Logically it is impossible when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States. (footnote omitted) But that question is not before us. It was argued in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944), that the taxation of the entire fleet of its airplanes in that State would result in multiple taxation since other States levied taxes on some proportion of the full value thereof. The Court rejected this contention as being 'not now before us' even though other States actually collected property taxes for the same year from Northwest upon 'some proportion' of the full value of its fleet. (footnote omitted) Here the records are all to the contrary. There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do." (358 U.S. 450 at pp. 462-463).

portionment formula in *General Motors v. District of Columbia, supra,* leaves the District formula in the same posture.

What we are suggesting is that if Interstate commerce is required to pay its fair share of state income taxes without being subject to discriminatory or multiple taxation (without congressional intervention) the traditional role of this Court in the disposition of income tax apportionment disputes requires modification. A greater degree of uniformity will be required to achieve these constitutional objectives than can be achieved by determining the constitutionality of a particular apportionment formula in the absence of a practical constitutional standard prescribed by this Court. In the absence of such a standard, how can a multiple taxation question or a tax discrimination question be resolved? Given the vagaries of the elements which produce the "net income" of modern complex businesses, how can this Court determine whether a particular apportionment formula results in a "fair" or "rational" apportionment, unless an apportionment formula is "tested" by reference to a standard deemed to be fair and rational by this Court?

In the instant case, the Appellant claims it is subject to multiple and discriminatory taxation on its Iowa business as a result of interaction of the Iowa single-sales-factor apportionment formula and the Illinois three-factor apportionment formula. If this results in unconstitutional multiple or discriminina-

tory taxation, is Iowa's formula invalid or is the formula of Illinois invalid? This can only be resolved by determining which formula more rationally and fairly apportions income. This Court cannot logically declare Iowa's single-sales-factor apportionment formula unconstitutional without negatively or affirmatively determining that another apportionment formula prescribes the constitutional limit which Iowa cannot exceed. Neither do we believe that it can, without the application of a standard, determine that the Iowa formula, standing alone, is not reasonably related to the income produced and the activities of Appellant in the state of Iowa for the years in question.

Net income is an abstract concept resulting from a host of operational events and transactions which take place within a time frame called a "tax year", all of which are significant in producing net income. In integrated commercial operations, net income is a product of labor, capital and sales. Without all of these major components, it is highly unlikely that any net income could be produced. Absent any standard, it is not unreasonable to attribute all net income to the distribution of property (*Underwood Typewriter Co. v. Chamberlain, supra*). Since there is no reason to assume that property is more important than sales in the production of net income, *Underwood* supports the constitutionality of the Iowa single-sales-factor apportionment formula as resulting in fair apportionment of unitary income.

We therefore respectfully submit that this Court

should conclude that the generally accepted, equally weighted three-factor apportionment formula of property, payroll and sales (UDITPA) constitutes the constitutional standard for state income tax apportionment purposes as applied to the total unitary income of integrated manufacturing-selling businesses; and that it is controlling for the apportionment of the total unitary income of such businesses unless the state or taxpayer establishes by clear and cogent evidence that its particular application produces an unreasonable result.

If, as noted by this Court in *General Motors v. District of Columbia, supra,* the standard three-factor formula is utilized by a great majority of the income tax states and it "can be justified as a rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates" (380 U.S. 561), it represents a reasonable and logical presumptive controlling constitutional standard for the apportionment of a general business corporation's unitary income. In the absence of adopting this or some other constitutional standard to determine the reasonableness of a state income tax apportionment formula, we do not believe it is appropriate for this Court to declare the Iowa single-sales-factor apportionment formula invalid because it assigns to Iowa an unconstitutional portion of net income.

D. Even Though Iowa's Single-Sales-Factor Apportionment Formula, Consistent With Prior Apportionment Decisions of This Court, Reasonably Apportions Net Income to Iowa, It Unconstitutionally Discriminates Against Out-of-State Manufacturers-Sellers If the Constitutionality of Such Formula Is Tested Against the Standard Three-Factor Formula or Any Other Formula Which Assigns Some Income to Manufacturing.

This Court has consistently held that the fundamental purpose of the commerce clause was to protect interstate commerce from discriminatory regulation or taxation. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Guy v. Baltimore,* 100 U.S. (10 Otto) 434 (1880); *Darnell & Son v. Memphis,* 208 U.S. 113 (1908); *Northwestern States Portland Cement Co. v. Minnesota, supra; Memphis Steam Laundry v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946); *Boston Stock Exchange, et al v. State Tax Commission,* 429 U.S. 318 (1977); *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Webber v. Virginia,* 103 U.S. 344 (1880); *Walling v. Michigan,* 116 U.S. 446 (1886); *Walton v. Missouri,* 91 U.S. 275 (1875); *Henneford v. Silas-Mason Co.,* 300 U.S. 577 (1937).

As noted by this Court in *Baldwin, supra,* in striking down New York's attempt to regulate the price of out-of-state milk purchases:

> "Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon

> the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."
> (294 U.S. 527).

As noted by this Court in the *Boston Stock Exchange* case, *supra*:

> "No State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business' [cases cited]. The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprise at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951); (The first quote of the Court is from *Northwestern States Portland Cement Co. v. Minnesota, supra*) (429 U.S. 329).

The discrimination cases under the commerce clause do not rest on due process considerations. Even though the Iowa income tax is reasonably measured by a single-sales-factor apportionment formula and reaches only legitimate taxable in-state activities or sources, if, in practical operation and effect, it permits Iowa to "discriminatorily tax the products manufactured or the business operations performed in any other State" (*Boston Stock Exchange v. State Tax Commission, supra*, 429 U.S. 318, 337), it should be struck down as violative of the commerce clause.

While there can be no question that the commerce clause requires equal tax treatment of interstate commerce as compared to intrastate commerce (*Halliburton Oil Well Co. v. Reily, supra*, and that the practical operation and effect of a state tax system controls in determining the presence or absence of such equality (*Best & Co. v. Maxwell*, 311 U.S. 454 (1940), resolution of discrimination questions depends upon the comparatives used in determining equality.

In *Halliburton, supra*, this Court required "equal treatment for in-state and out-of-state taxpayers similarly situated." (373 U.S. 70). The Iowa statute standing alone treats Appellant and other out-of-state manufacturers-sellers the same as in-state manufacturers-sellers. Both pay an Iowa income tax on Iowa income attributable to Iowa sales.[7] The question of discrimination resolves itself down to a question of the proper *measure* of the Iowa income tax. It is measured by Iowa sales as compared to total sales. If it is permissible to attribute all income of a manufacturer-seller on the basis of the distribution of sales, there is no basis for any claim of discrimination. On the other hand, if some income is required to be assigned to manufacturing, the Iowa formula discriminates against out-of-state manufacturers-sellers selling in Iowa as compared to Iowa manufacturers-sellers selling into other states.

Since the Iowa corporate income tax is imposed

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[7] Since the income of intrastate businesses that manufacture and sell only in Iowa is not apportioned, they pay Iowa income tax on their entire income. Thus, exclusively intrastate business is not favored by the Iowa apportionment formula.

"on the portion of the net income reasonably attributable to the trade or business within the state"; including income derived from the manufacture or sale of tangible personal property (Jur. St., Appendix E, A100), it appears the tax is imposed on both manufacturing and selling. It is an income tax on corporate businesses and not on corporate sales. Therefore, a proper comparison for discrimination purposes may be to compare the practical operation and effect of the Iowa income tax single-sales-factor apportionment formula on instate manufacturers selling out-of-state with out-of-state manufacturers selling in-state.

As indicated by this Court in *General Motors v. District of Columbia, supra*, the single-sales-factor apportionment formula permits an in-state manufacturer that sells its product entirely without the state to pay no tax on income derived from its manufacturing operations and to pay a tax on only a third of its income derived from sales to the states which apportion income by the three-factor formula. On the other hand, an out-of-state manufacturer under the same circumstances would be exposed to a potential tax liability of 167% of its income if it manufactured in a three-factor apportionment state and sold its total product to Iowa. Certainly, this practical operation and effect of the single-sales-factor formula of Iowa coupled with the general use of the three-factor apportionment formula subjects in-state manufacturers to preferential taxation and requires businesses to locate in Iowa or suffer discriminatory taxation.

It is thus evident, however, that if the Iowa single-sales-factor apportionment formula discriminates against in-state manufacturers selling out-of-state as compared to out-of-state manufacturers selling in Iowa, the constitutionality of the Iowa apportionment formula must be determined by reference to what constitutes a "fair" or "rational" apportionment of income to Iowa by reference to the foregoing classification of taxpayers. Since a "fair" and "rational" apportionment is achieved by UDITPA, we believe that this Court should adopt UDITPA as the constitutional standard to resolve multiple or discriminatory tax burden questions under the commerce clause. Without the adoption of this standard or some other standard requiring some income to be apportioned to manufacturing, we do not believe the Iowa formula unconstitutionally discriminates against or imposes a prohibited multiple burden on interstate commerce.

III

CONCLUSION

Historically, this Court has decided apportionment controversies by determining on a case by case basis whether a particular formula of a particular state exceeded constitutional limits. It has never before been confronted with a case where two apportionment formulae, as applied by two states, has the result of subjecting the net income of a taxpayer attributable to the two states to multiple and discriminatory bur-

dens.[8] If both states are to be treated fairly and if interstate commerce is to be freed from such burdens, this Court is required to determine what constitutes a fair and rational apportionment formula for the attribution of the unitary income of a unitary business for state income tax purposes. The Commission believes that the UDITPA three-factor formula which has been adopted by a vast majority of the income tax states and is contained in article IV of the Compact should be determined by this Court to constitute the presumptive constitutional standard for the apportionment of unitary income of an integrated manufacturer-seller business and that such standard should be applied in the instant case to determine whether or not Iowa exceeded that standard by the single-sales-factor apportionment on its face or as applied to the Appellant.

Although we believe resolution of the issue in this case requires the Court to "test" the constitutional validity of the Iowa single-sales-factor apportionment formula on its face against the reasonableness of the three-factor apportionment formula, we do not believe that resolution of this issue would entitle the Appellant to any relief. As noted *supra* at page 5 Iowa has not attempted to apportion the entire unitary income of Appellant and the record does not disclose this entire unitary income and the apportionment results of a three-factor formula applied to this

8 This leads one to believe that maybe the real issue in this case is: "Does one state have to take into account the apportionment formulae of all other states in adopting a formula for apportioning the income of a multistate unitary enterprise?"

unitary income if the Appellant conducted a unitary business with its wholly owned subsidiaries. Under such circumstances, it is not possible to determine whether or not the Iowa formula as applied exceeds the constitutional limit of the apportionment of Appellant's entire unitary income by the three-factor formula.

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